No. 75-901

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

EDWARD M. ESBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the evidence was insufficient to sustain his conviction for uttering counterfeit treasury bills.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and a co-defendant, Joseph Amato, Jr., were convicted of possessing counterfeit obligations of the United States (ten counterfeit $100,000 United States Treasury bills) and of passing them with intent to defraud, in violation of 18 U.S.C. 472 and 2; they were also convicted of conspiracy to pass, utter, and publish as genuine such counterfeit obligations of the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent six-month prison terms on each of three counts. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that co-defendant Amato contacted Robert Spicer, a businessman in Orlando,

Florida, and told him that he needed a line of credit in connection with a planned business endeavor in central Florida. In subsequent conversations Amato told Spicer and a business associate that he could assist them in obtaining a construction performance bond that they needed in order to commence a project in Alabama, and that he would be coming to Orlando with an associate to make the necessary arrangements (Tr. 51-60).

On December 5, 1974, Amato returned to Orlando and told Spicer that he could provide about $1,000,000 in collateral in order to get a line of credit but that he did not have the collateral with him (Tr. 61-70). Later that day petitioner joined Amato, Spicer, and others for dinner (Tr. 69). The next morning they arranged for Amato to check out an automobile dealership in Orlando while petitioner, his business associate DeLambo, and Spicer were to deposit the collateral in an Ormond Beach, Florida bank.

Upon arriving at the bank, petitioner attempted to give a secretary an envelope containing ten counterfeit $100,000 Treasury bills, but he was told he would have to give the bills to Douglas Brady, the vice president and trust officer (Tr. 79-80, 393-397). Thereafter Spicer introduced petitioner to Brady as an attorney from Cleveland who had a million dollars in Treasury bills to deposit in a trust account. Petitioner gave Brady the ten counterfeit $100,000 Treasury bills, obtained a receipt, and stated that he would like to replace the bills prior to their expiration date in April 1975 when, in the course of the usual practice, the bank would cash them in (Tr. 85-93).

After petitioner had left, Brady examined the bills more closely and discovered that certain portions of two letters were missing, that some of the letters were blurred, and that the paper did not appear to be of the type on which government obligations are printed (Tr. 340, 346-348). Subsequent investigation by federal authorities revealed that the bills were counterfeit.

Petitioner's contention that the evidence was insufficient to sustain his conviction rests on the claim that his possession and uttering of counterfeit bills did not support the jury's finding that he had guilty knowledge. The evidence, however, showed that petitioner possessed not a small amount of counterfeit money but $1,000,000 in counterfeit bills of poor quality and appearance. Beyond this, when he deposited them at the bank, he appeared nervous and stated that, contrary to the normal practice, the bills would be replaced prior to maturity.[1] In addition, petitioner's testimony that Spicer had invented the entire episode for his own purposes was disbelieved by the jury. And, as the court below pointed out, there was a substantial conflict between petitioner's trial testimony and his statement to the investigators.

In short, the jury had ample evidence to conclude that petitioner had the requisite criminal intent to warrant a conviction. As the court stated in *United States* v. *Barham*, 466 F.2d 1138, 1140 (C.A. 9), certiorari denied, 410 U.S. 926:

> The jury was not bound to accept appellant's testimony that he did not know that the currency was counterfeit. It was not bound to accept, as true, his account of the circumstances of the acquisition of the counterfeit currency which, to say the least, borders upon incredulity. It was not bound to accept his explanation of the use of the alias. All such circumstances were reasonably susceptible to the drawing, by the jury, of inferences adverse to appellant's contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[1]Had the bills been cashed in by the bank at maturity, their counterfeit nature would have been recognized.